United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original - Affidavit of Mailing

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To be argued by
THOMAS A. ILLMENSEE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1364

In the Matter of the Application of

CHARLES J. LANTZ,
Petitioner-Appellant,

—against—

ROBERT C. SEAMANS, JR., Secretary of the Air Force,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

RAYMOND J. DEARIE,
THOMAS A. ILLMENSEE,
Assistant United States Attorneys
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Preliminary Statement

Charles J. Lantz, an unattached, inactive member of the United States Air Force Reserve appeals from an order of the United States District Court for the Eastern District of New York (Costantino, *J.*), entered January 30, 1974, which dismissed a habeas corpus proceeding commenced by Lantz, for lack of jurisdiction. Appellant had sought habeas corpus relief after the United States Air Force denied his application for a discharge, which was based upon an alleged conscientious objector status.

The sole issue raised on appeal is whether the District Court had jurisdiction to issue the writ, or order to show cause,* if the proper military custodian-respondent is neither

* 28 U.S.C. § 2241(a) provides in part that "Writs of habeas corpus may be granted by . . . the district courts . . . within their respective jurisdictions." 28 U.S.C. § 2243 states that "A court or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, . . ."

to be found within the district, nor within reach of the Court's process. Appellant maintains that his domicile in New York, alone, was sufficient to give the District Court jurisdiction.

Statement of Facts

Appellant Lantz was a resident of Ohio, before entering American University Law School, Washington, D. C. in September of 1969 (A. 8a). As an undergraduate he earned an ROTC commission in the United States Air Force Reserve, and at his request, his active duty was deferred to enable him to attend law school (A. 3a, 16a). While in law school, Lantz submitted his application for a discharge as a conscientious objector. He was thereafter interviewed by an Air Force Chaplain and psychiatrist at Andrews Air Force Base in Maryland in October 1972 (A. 3a). He alleged that during law school he became a conscientious objector (A. 8a-29a). In accordance with applicable regulations, he was afforded a hearing on November 3, 1972 before Lt. Col. Bon Tempo at Andrews Air Force Base (A. 44a-47a).

After graduating from law school, Lantz moved to New York City and commenced work with the Legal Aid Society (A. 2a). By letter dated July 27, 1973, the Air Force informed appellant that his request for a discharge as a conscientious objector had been denied. Appellant was advised that the Secretary of the Air Force had concluded that appellant had failed to demonstrate that his beliefs were sincere and deeply held (A. 7a).

As an unattached, inactive reservist,* Lantz filed a petition for a writ of habeas corpus in the Eastern District

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* From the time Lantz received his ROTC commission to the present time, his nominal commanding officer has been Commanding Officer, Headquarters, United States Air Force Reserve Center, Denver, Colorado, where his military records are kept.

of New York on August 28, 1973. The District Court refused to sign a temporary restraining order prohibiting the issuance of active duty orders. Orders to active duty were later published, and amended on two occasions, to extend Lantz's reporting date during the pendency of the proceeding in the District Court. On September 14, 1973, the Secretary of the Air Force, the only named respondent, moved to dismiss for lack of subject matter jurisdiction, and lack of jurisdiction over the person (A. 48a). The District Court dismissed the proceeding with a memorandum and order dated January 30, 1974 (A. 50a-54a). Thereafter, without Government opposition, the Court signed an order on March 25, 1974 staying Lantz's activation orders pending the outcome of this appeal.

ARGUMENT

The order of the District Court dismissing appellant's habeas corpus proceeding should be affirmed.

It is not disputed on this appeal that an unattached, inactive reservist may maintain a habeas corpus proceeding to effect his release from an armed service as a conscientious objector. The sole issue now before this Court is whether the District Court had jurisdiction to hear appellant's habeas corpus proceeding. Appellant argues that his domicile alone, within the Eastern District of New York was sufficient to confer jurisdiction upon the District Court over the named respondent.

In *Schlanger* v. *Seamans*, 401 U.S. 487 (1971), the Court held that a district court has the power to issue the writ to a military custodian, only where a commanding officer or other custodian in the chain of command is present within the judicial district. However, in *Strait* v. *Laird*, 406 U.S. 341, 343 (1972)* the Court extended the concept

* The holding in *Strait* was based in large part on the Second Circuit's opinion in *Arlen* v. *Laird*, 451 F.2d 684 (2d Cir. 1971).

of the custodian being present by holding that an unattached. inactive reservist may bring a habeas proceeding where he has had "meaningful contact" with the military, and that such contact would constitute the presence required by *Schlanger* v. *Seamans, supra.* The Court amplified its holding by stating:

> In the present case California is Strait's home. He was commissioned in California. Up to the controversy in the present case he was on reserve duty, never on active duty, and while he had gone east for graduate work in law, California had always been his home. Fort Ord in California was where his application for conscientious objector discharge was processed and where hearings were held. It was in California where he had had his only meaningful contact with the Army, and his superiors there recommended his discharge as a conscientious objector. 406 U.S. at 343.
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> * * * * *
>
> Indeed, in the course of Strait's enlistment, virtually every face-to-face contact between him and the military has taken place in California. 406 U.S. at 344.

Justice Douglas, writing for the majority, made it clear that the Court was not abandoning the holding in *Schlanger* v. *Seamans, supra,* that the custodian must be present within the territorial jurisdiction of the district court. 406 U.S. at 343.*

In the case at bar, appellant places paramount importance on *Eisel* v. *Secretary of the Army,* 477 F.2d 1251 (D.C.

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* The dissenting opinion of Justice Rehnquist, in which Chief Justice Berger and Justices Brennan and Powell joined, expressed the view that the majority had "emasculate[d]" *Schlanger* v. *Seamans. Strait* v. *Laird, supra,* 406 U.S. at 346.

Cir. 1973), and asserts that his mere domicile in New York was sufficient to give the District Court jurisdiction to entertain the habeas corpus proceeding. The court in *Eisel,* after a lengthy and thorough exposition of the law pertaining to habeas jurisdiction in unattached, inactive reservist cases, held that the domicile of the petitioner constituted the proper forum for commencing the proceeding. 477 F.2d at 1263-1266. The conclusion reached in *Eisel* was based on the following interpretation of *Strait*:

> The Court in *Strait* felt there were essentially four factors relevant to its determination that California was the proper forum for the petitioner's action: (1) California was Strait's "home"; (2) he had never been on active duty; (3) California was where he had received his commission; and (4) California was where petitioner had made his apnlication fornia was where petitioner had made his application for release from the military and where the application had been processed.
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> * * * * *
>
> The Court in *Strait* did not tell us which of the several factors it considered where determinative there. Undoubtedly, it considered all of them relevant and did not wish unnecessarily to decide which should prevail when they might be in conflict. 477 F.2d at 1264.

The Government contends that a fair and reasonable reading of *Strait* v. *Laird, supra,* cannot, under any circumstances, support the conclusion of the *Eisel* court. We submit that the majority in *Strait* made it manifestly clear that custodial presence in a district, created by a petitioner's "meaningful contacts" with the military therein, was an absolute requisite for habeas jurisdiction.

To determine which district courts have jurisdiction in habeas corpus proceedings, it must first be determined who the proper custodian is (the "respondent"), and then proceed to the question of which district courts can obtain in person jurisdiction over that custodian. *Strait* v. *Laird, supra,* also held that the nominal custodian in unattached, inactive reservist cases is the commanding officer of the particular armed service's record keeping center. 406 U.S. at 344. In this case, Lentz's nominal custodian is the Commanding Officer, Headquarters, United States Air Force Reserve Center, Denver, Colorado.

A custodian who is not amenable to a court's process deprives the court of jurisdiction in a habeas corpus proceeding. *Schlanger* v. *Seaman,* 401 U.S. 487, 491 (1971). In *Braden* v. *30th Judicial District Court of Kentucky,* 410 U.S. 484, 494-95 (1973) the court reiterated this jurisdictional requirement.

> The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody. Wales v. Whitney, 114 U.S. 564, 574, 5 S.Ct. 1050, 1054-1055, 29 L.Ed. 277 (1885). In the classic statement:
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> > "The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent." In the Matter of Jackson, 15 Mich. 417, 439-440 (1867), quoted with approval in Ex parte Endo, 323 U.S. 283, 306, 65 S.Ct. 208, 220, 89 L.Ed. 243 (1944);

> Ahrens 1. Clark, 335 U.S. 188, 196-197, 68 S.Ct. 1443, 1447, 92 L.Ed. 1898 (1948) (Rutledge, J., dissenting).
>
> Read literally, the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" . . . *

Thus, under the facts of this case, there are two district courts where petitioner's nominal commanding officer is present, and thus amenable to service of process. Obviously this action can be brought in Colorado since petitioner's custodian is to be found there, and by virtue of the holding in *Strait* v. *Laird, supra,* Lantz's commanding officer acquired presence in Maryland when the Air Force processed the conscientious objector application at Andrews Air Force Base, at the request of Lantz.** Therefore, the District Court for the Eastern District of New York lacks jurisdiction over Lantz's commanding officer and all individuals in his chain of command. There is no respondent for a proceeding in the Eastern District amenable to the court's process, thus depriving the court of jurisdiction. Appellant seeks to have this court find jurisdiction based upon domicile, the location of witnesses,*** and the general convenience to the parties of litigating this case in the Eastern District of New York. These are venue and *forum non conveniens* considerations, and should play no part in a determination of the district court's jurisdiction.

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* *See also, United States ex rel. Rudick* v. *Laird,* 412 F.2d 16, 21 (2d Cir. 1969).

** *See, McGee* v. *International Life Insurance Co.,* 355 U.S. 220 (1957); *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1946).

*** Most letters received in support of petitioner's application were from individuals located in the District of Columbia—Maryland area.

CONCLUSION

The order of the District Court dismissing appellant's habeas corpus proceeding should be affirmed.

Respectfully submitted,

June 3, 1974

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 3rd day of June 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~a~~ two copies of the brief for the appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Frederick H. Cohn, Esq.
640 Broadway
New York, New York 10012

Sworn to before me this
3rd day of June 1974

Deborah J. Amundsen
DEBORAH J. AMUNDSEN

[illegible]
Notary Public, State of New York
No. 24-[illegible]
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

SIR:

PLEASE TAKE NOTICE that the within will be presented for **settlement and signature** to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

_____, 19____

_____

United States Attorney,
Attorney for _____

To:

_____

_____

_____

Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly **entered** herein on the ____ day of _____ _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,

Dated: Brooklyn, New York,

_____, 19____

_____

United States Attorney,
Attorney for _____

To:

_____

_____

_____

Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ _____is hereby admitted.

Dated: _____, 19____

_____

Attorney for _____

FPI-LC-5M-8-73-7355